BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHERYL J. GILMORE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,037,592
CRAWFORD COUNTY MENTAL HEALTH	)	
Respondent	)	
AND	)	
	)	
FIRSTCOMP INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the February 24, 2010, preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded medical benefits after the ALJ determined that she had suffered personal injury by accident which arose out of and in the course of her employment with respondent and that claimant's ongoing medical problems stemmed from that accident.

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Jennifer Arnett of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Brian Curtis, M.D., taken October 29, 2009, with attachments; the transcript of Preliminary Hearing held February 23, 2010, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Respondent contends the fall suffered by claimant on August 31, 2007, and the resulting injuries were the result of a personal problem that claimant had been experiencing for several months. Claimant contends the fall was

caused by the activities associated with her job, and specifically the requirement that claimant bend over and pick up trash from the ground.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked as a part-time housekeeper for respondent. On August 31, 2007, while vacuuming a floor, claimant bent over to pick up a piece of paper from the floor. At some point, claimant fell, landing on her buttocks and striking her head on some cabinets. Claimant does not remember what caused the fall. Claimant was transported to Mt. Carmel Medical Center by ambulance and ultimately came under the care of board certified neurological surgeon Brian Curtis, M.D., with the first examination being on January 2, 2008. Dr. Curtis' medical history on claimant indicated that claimant had suffered from a several-month history of falling and had been diagnosed with coordination ataxia on October 24, 2007. Claimant was diagnosed, with the aid of an MRI, with central cord syndrome secondary to the August 31, 2007, fall. Claimant also had cervical stenosis, or a narrowing of the spinal canal, which impacts first the feet and then the hands and upper extremities with weakness and numbness. The stenosis also creates ambulatory problems. Dr. Curtis testified that the cervical stenosis made claimant more susceptible to injury. He opined that if claimant had a prior dysfunction, then the injury was superimposed upon that condition.

Claimant currently resides in a nursing home as she is in need of assisted living. This need for assistance may continue for months and possibly up to a year according to Dr. Curtis.

Claimant's medical history is further complicated by a history of falling out of bed for several months leading to the alleged work injury. Additionally, claimant complained of muscle weakness in her legs, limping and weakness in her hip flexors. Claimant was also in an automobile accident when she was 13 years old, with a history of one month in a coma and temporary paralysis on the left side. She also suffers from arthritis, high cholesterol, lung disease and high blood pressure, and she has been a smoker for 45 years, consuming a pack of cigarettes per day.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

[1] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

It is undisputed that claimant fell on August 31, 2007, and struck her head. The medical testimony of Dr. Curtis supports claimant's contention that the fall caused the injury which led to the surgery followed by claimant's need for being in the nursing home. However, respondent contends that the fall is not the result of any work-related activity. With claimant's history of falling and muscle weakness, respondent contends the fall was due to a preexisting condition and/or occurred as the result of the natural aging process. However, this record does not clarify the actual cause of the fall. All that claimant remembers is bending over to pick up a piece of paper. This act of cleaning is a normal part of claimant's job duties for respondent. Had claimant described a dizzy spell or some physical weakness as the cause of the fall, respondent's argument would be better supported. But claimant cannot remember what caused the fall.

In *Hensley*,[5] the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are

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[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2007 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); see also *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d. 5, 61 P.3d 81 (2002).

personal to the worker; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson's Worker's Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

With this record, it is not possible to determine whether the fall was the result of claimant's preexisting condition or just an unexplained fall. As noted above, unexplained falls are generally deemed compensable due to the circumstances during which they occur. Claimant was clearly in the course of her employment when the fall occurred. The uncertainty as to why she fell creates the difficulty in determining whether the fall arose out of the employment. Based on Larson's and the Supreme Court in *Hensley*, this Board Member finds that this is an unexplained fall and, thus, a neutral risk. Therefore, the award of benefits under the Workers Compensation Act is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered an accidental injury which arose out of and in the course of her employment with respondent on August 31, 2007. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated February 24, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[6] K.S.A. 44-534a.

Dated this ____ day of June, 2010.

HONORABLE GARY M. KORTE

c: William L. Phalen, Attorney for Claimant
Jennifer Arnett, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge